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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 17

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

FRANK EDWARD PENNINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 8, 1969, in the case of Frank Edward Pennington, Appellee, v. C. C. Peyton, Superintendent of the Virginia State Penitentiary, Appellant. The mandate was stayed on January 29, 1969.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, of June 25, 1968, will be found in Appendix I. The opinion of the United States Court of Appeals for the Fourth Circuit of January 8, 1969, will be found in Appendix II.

THE JUDGMENT

The judgment was entered on January 8, 1969.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The Imposition Of An Increased Sentence Upon Conviction Of A State Prisoner In A Retrial Is Unconstitutional?

STATUTES INVOLVED

§ *2254. State custody; remedies in Federal courts*

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available

state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed

to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of

the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (28 U.S.C., Section 2254, as amended)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of

the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

§ *53-272. Suspending sentence and placing on probation.* —After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended. (Code of Virginia)

§ *19.1-291. Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. (Code of Virginia)

§ *19.1-249. Accused guilty of part of offence charged, sentence; on new trial what tried.*—If a person indicted of a felony be by the jury acquitted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantialy charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial. (Code of Virginia)

STATEMENT OF THE CASE

Frank Edward Pennington, Jr., hereinafter referred to as the prisoner, was first convicted in the Hustings Court of the City of Roanoke in 1959 on some ten charges of statutory burglary. In the same year in the Circuit Court of Roanoke County he was convicted on three charges of statutory burglary. He escaped from custody on May 1, 1960, and was recaptured on May 6, 1960. While on escape, he committed other crimes and was convicted in the Circuit Court of Bland County on June 28, 1960, on two charges of statutory burglary and one of escape. Because of the Bland County convictions, he was tried as a recidivist, pursuant to the provisions of § 53-296 of the Code of Virginia, on March 15,

1961, found to be a second-time offender, and sentenced to serve one year in the penitentiary.

In *Chewning* v. *Cunningham,* 368 U.S. 443 (1962), the Supreme Court of the United States held that the prisoner was entitled to counsel at a recidivist trial. Therefore, the Commonwealth permitted all prisoners who desired to do so to move that their recidivist convictions be set aside, if they had not been represented by counsel. The prisoner was granted this opportunity, and on October 23, 1963, his second conviction sentence for one year was declared null and void. On the same date he was retried and sentenced to serve two years in the penitentiary with six months of his term being suspended during his good behavior.

This conviction was set aside by the United States District Court for the Eastern District of Virginia, Richmond Division, on April 27, 1967, on the ground that the prisoner had not been allowed to challenge anyone on the jury for cause. The prisoner was again retried on June 14, 1967, and received two years with six months suspended conditioned upon his good behavior.

He appealed this judgment to the Supreme Court of Appeals of Virginia. The Supreme Court denied a petition for a writ of error, and then he filed in the Federal court below. The District Judge held, on the basis of *Patton* v. *North Carolina,* 381 F. 2d 636 (4th Cir., 1967), that the recidivist sentence was invalid because he had received more time when he was convicted on the second and third occasions as a two-time offender.

Thereafter, the Superintendent sought an appeal to the United States Court of Appeals for the Fourth Circuit. That Court appointed counsel, and briefs were filed. The case was scheduled for oral argument on December 5, 1968. A few days before the case was to be argued, counsel were notified that oral argument was not desired. The Court

below did not deign to hear the argument on behalf of the Commonwealth of Virginia in this matter but summarily affirmed the judgment of the District Court.

ARGUMENT

The Superintendent will demonstrate that the decision of the Court below, holding that a prisoner cannot receive a greater sentence on retrial after his conviction has been set aside, is without basis in law. Moreover, the Superintendent will show that the Court below has ignored this Court's decision in *Robinson* v. *United States,* 324 U.S. 282, rehearing denied, 324 U.S. 889, second rehearing denied, 325 U.S. 895 (1945).

The United States Court Of Appeals For The Fourth Circuit Erred In Holding That The Imposition Of An Increased Sentence Upon Conviction Of A State Prisoner In A Retrial Is Unconstitutional.

The facts in this matter have been hereinbefore summarized and need not be repeated. The decision in the Court below was premised upon its decision in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967). Unlike *Patton,* however, the prisoner's initial retrial was not caused by the issuance of a writ of habeas corpus. The prisoner was first tried as a recidivist in March of 1961 and sentenced to serve a term of one year in the penitentiary. Thereafter, this Court decided *Chewning* v. *Cunningham,* 368 U.S. 443 (1963). As a result of this Court's decision in the cited case, and in an effort to avoid the necessity of some eighteen hundred habeas corpus cases, the prisoner was given an opportunity to accept the sentence which he had received when he was not represented by counsel or to move to set aside the judgment. Counsel were appointed to represent all of these prisoners, and petitioner's attorney advised him in this regard. The motion to set aside the judgment, of

course, was contrary to Virginia law, but the Commonwealth did not object, in order that these cases might be processed quickly and the prisoners given an opportunity for retrial, if they so desired. In this case, the prisoner desired a retrial and was granted the same. As a result of this retrial, he received an increased sentence.

The decision of the Court below was premised upon its own opinion in *Patton* v. *North Carolina,* 381 F. 2d 636 (4th Cir. 1967). Other courts, however, have not agreed with the Court's decision. The Seventh Circuit Court of Appeals in *United States* v. *Russell,* 378 F.2d 808 (7th Cir. 1967), and *United States* v. *White,* 382 F.2d 445 (4th Cir. 1967), held that a greater sentence can be imposed upon retrial. In this connection, see also *Marano* v. *United States,* 374 F.2d 583 (1967).

Since the decisions of this Court in the premises and the decisions of the United States Court of Appeals for the Fourth Circuit are in disagreement, it is submitted that a writ of certiorari should be granted, in order that this Court can rule in the premises.

Moreover, it is quite clear that the Court below ignored the decision of this Court in *Robinson* v. *United States,* 324 U.S. 282, rehearing denied, 324 U.S. 889, second rehearing denied, 325 U.S. 895 (1945). In this case, the prisoner was serving a sentence of life imprisonment for kidnapping. His conviction was set aside because he had purportedly not intelligently waived counsel. At his second trial he was sentenced to death. This Court upheld this conviction, and it is submitted that *Robinson* is controlling herein. The Court below in ignoring this Court's decision in the cited case has given an additional reason why this Court should issue the writ of certiorari to review the judgment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 17th day of March, 1969, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to A. James Kauffman, Esquire, Attorney at Law, 700 Building, Richmond, Virginia 23219, counsel for the respondent herein.

RENO S. HARP, III
Assistant Attorney General

APPENDIX I

Order

Frank Edward Pennington, a prisoner in the Virginia State Penitentiary, has petitioned this Court in forma pauperis for a writ of habeas corpus. He attacks his conviction in the Circuit Court of the City of Richmond on June 14, 1967 under the Virginia recidivist laws, for which he received a two-year sentence, with six months suspended for good behavior. Pennington contends that the sentence he received in Richmond in June 1967 was greater than allowed by law. All available state remedies have been exhausted and the matter is thus properly before this Court for decision at this time. Pennington is currently scheduled to begin service of the sentence on August 12, 1968.

Pennington was first tried as a recidivist in March of 1961; he was then given a one year sentence, to begin at the expiration of the sentence he was then serving. This sentence, on petitioner's motion, was vacated in October of 1963 as required by Chewning v. Cunningham, 368 U.S. 443 (1962). He was immediately retried under the Virginia recidivist law, convicted, and sentenced to two years, with six months suspended for good behavior. This conviction was set aside and vacated by Judge Butzner of this court in Civil Action No. 4730-M on the ground that the defendant was not allowed to challenge anyone on the jury for cause. Pennington was again retried as a recidivist in June of 1967. He was then convicted and sentenced to a term of two years, with six months suspended for good behavior.

This sentence must be set aside and vacated and the case remanded to the Circuit Court of the City of Richmond for imposition of a lawful sentence prior to August 12th next, and

It Is So Ordered.

Patton v. North Carolina, 256 F.Supp. 225 (W.D.N.C. 1966), affirmed 381 F.2d 636 (4th Cir. 1967), cert. den. 390 U.S. 905 (1968), makes it clear that the sentence given at the first trial becomes the ceiling at retrial. Pennington cannot be given a sentence for a longer term than imposed in the March 1961 hearing, namely, one year, to begin at the expiration of the sentence he was then serving.

The Clerk will send copies of this order to the petitioner, the respondent and the Attorney General of Virginia.

/s/ OREN R. LEWIS
United States District Judge

At Alexandria
June 25, 1968

APPENDIX II

Opinion Of The United States Court Of Appeals For The Fourth Circuit

PER CURIAM:

Frank Edward Pennington was first tried as a recidivist in March 1961 an given a one year sentence. This sentence on petitioner's motion was vacated in October of 1963 as required by *Cheuning v. Cunningham,* 368 U S 443 (1962). A second re-trial was subsequently invalidated. At his third trial in the Circuit Court of the city of Richmond in June of 1967 he was again convicted and sentenced to a term of two years, with six months suspended for good behavior. The district court held that under *Patton v. North Carolina,* 381 F 2d 636, Pennington could not constitutionally be sentenced for a term longer than imposed at his first trial. A writ of habeas corpus was issued to compel his release unless lawfully re-sentenced within the limitation of *Patton.*

We adhere to our decision in *Patton* v. *North Carolina, supra,* and since no other question is presented on appeal we summarily affirm.

Affirmed.